Supreme Court, U.S.
FILED

001532 APR - 5 2001

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

DENNIS McGLYNN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

FRED M. MORELLI, JR.
403 W. Galena Blvd.
Aurora, IL 60506
630/892-6665

Attorney of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4600

QUESTIONS PRESENTED FOR REVIEW

I. Was Defendant, Dennis McGlynn, deprived of his constitutional right to present a defense to the criminal charges against him?

II. Do FAA Regulations pre-empt the National Park Service authority to regulate aeronautical activity over and on the surface of Lake Powell, a designated landing area for aircraft in the Lake Powell National Recreational Area?

III. Are National Park Service Regulations 36 CFR § 2.17(a)(1) and (a)(3) ambiguous and do they adequately and clearly describe what conduct is prohibited particularly when considered in conjunction with 36 CFR § 7.70(a)(6)?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iii

Opinions Below Entered in the Case 1

Jurisdiction 1

Statutes and Regulations 2

Statement of the Case 5

Reasons for Granting the Writ 7

I. Defendant, Dennis McGlynn, Was Deprived Of His Constitutional Right To Present A Defense To The Criminal Charges Against Him 7

II. The National Park Service Does Not Have Authority To Regulate Aeronautical Activity On Airstrips In National Parks 14

III. National Park Service Regulations 36 CFR § 2.17(a)(1) And (a)(3) Are Ambiguous And Do Not Clearly Describe What Conduct Is Prohibited 17

Conclusion 21

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

City of Burbank v. Lockhead Air Terminal, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973).....14, 16

Deschler v. Fireman's Fund American Life Insurance Company, 663 P.2d 97, 39 ALR 4th 209 (Supreme Court of Utah (1983)).....20

Edison v. The Reliable Life Insurance Companies, 664 F.2d 1130 (9th Cir. 1981).....16, 20

Kmart Corp. v. Carter, Inc., 486 U.S. 281, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988).....20

Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).....18, 20

Louisiana Regional Airport v. Aero Resources, 962 F.Supp. 866 (N.D. La. 1993).....16

Skydiving Center v. St. Mary's County Airport Commissioner, 823 F.Supp. 1273 (D. Md. 1993).....16

United States v. Bevel, 558 F.Supp. 95 (N.D. Ga. 1983).....8

United States v. William Oxx, et al., 980 F.Supp. 405 (D. Utah 1997) (reversed 127 F.3d 1277 (10th Cir. 1997)).....*passim*

Wilson v. Insurance Co. of North America, 453 F.Supp. 732 (N.D. Cal. 1978).....16

STATUTES:

Title 16 United States Code § 1; 7(a).....2, 14

Title 49 United States Code § 106; 40103.....3, 14

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS:

Title 14 Code Federal Regulation § 1.1 (1997).... 4, 11, 12

Title 36 Code Federal Regulation § 2.17(a)(1); (a)(3); (e)..... *passim*

Title 36 Code Federal Regulation § 7.70(a)(6).... *passim*

Federal Aviation Administration Compliance Code 5190.6A (10/2/89), par. 4-8(a)(1) and 4-8(b) 5, 16

PETITION FOR WRIT OF CERTIORARI

Petitioner, Dennis McGlynn, respectfully prays that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Tenth Circuit entered on December 15, 2000.

OPINION BELOW ENTERED IN THE CASE

United States v. Gravity Sports, Ltd. and Dennis McGlynn, unpublished slip op., 10th Circuit No. 00-4098 dated 12/15/00.

Copy in Appendix.

United States v. Gravity Sports, Ltd. and Dennis McGlynn, unpublished slip op., D. Utah No. 2:96-CR-0052B, dated 5/26/00.

Copy in Appendix.

JURISDICTION

The judgment sought to be reviewed was filed on December 15, 2000. A Petition for Rehearing En Banc was denied on January 19, 2001. This Supreme Court of the United States has jurisdiction under 28 U.S.C. §1254(a) to review on Writ of Certiorari the judgment sought to be reviewed of the United States Court of Appeals for the Tenth Circuit. This petition is being filed within 90 days after entry of the judgment denying the Petition for Rehearing as provided by Supreme Court Rule 13.

STATUTES AND REGULATIONS

Title 16 United States Code §1.

"§1. Services created; director; other employees

There is created in the Department of the Interior a service to be called the National Park Service, which shall be in charge of a director, who shall be appointed by the President, by and with the advice and consent of the Senate.

. . .

The services thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

Title 16 United States Code §7(a)

"§7a. Airports in national parks, monuments and recreation areas; construction, etc.

The Secretary of the Interior (hereinafter called "Secretary") is authorized to plan, acquire, establish, construct, enlarge, improve, maintain, equip, operate, regulate, and protect airports in the continental United States in or in close proximity to, national parks, national monuments, and national recreation areas, when such airports are determined by him to be necessary to

the proper performance of the functions and the Department of the Interior: Provided, That no such airport shall be acquired, established, or constructed by the Secretary unless such airport is included in the then current revision of the national airport plan formulated by the Secretary of Transportation pursuant to the provisions of the Federal Airport Act: Provided further, That the operation and maintenance of such airports shall be in accordance with the standards, rules or regulations prescribed by the Secretary of Transportation."

49 United States Code §40103

"§40103. Sovereignty and use of airspace

(a) Sovereignty and public right of transit – (1) The United States Government has exclusive sovereignty of airspace of the United States.

. . .

(b) Use of airspace – (1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for –

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."

Regulations:

14 CFR §1.1

"Parachute means a device used or intended to be used to retard the fall of a body or object through the air."

36 CFR §2.17(a)(1); (a)(3); (e)

11(a) The following are prohibited.

"(1) operating or using aircraft on lands or waters other than at designated take off or landing areas, except pursuant to the terms and conditions of a permit."

. . .

"(3) delivering a person or object by parachute, helicopter, or other means of air delivery, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit. For the purposes of this paragraph, "delivery" means the act of conveying or releasing persons or property."

. . .

"(e) the operation of aircraft shall be in accordance with regulations of the Federal Aviation Administration."

36 CFR §7.70(a)(6)

"§7.70 Glen Canyon National Recreation Area

(a) Designated airstrips

. . .

(b) The entire surface of Lake Powell, subject to the restrictions contained in §2.17 of this chapter."

Federal Aviation Administration Compliance Code 5190.6A (10/2/89), par. 4-8(a)(1) and 4-8(b)

Appendix

STATEMENT OF THE CASE

Petitioner, Dennis McGlynn, is charged by a misdemeanor Indictment with aiding and abetting Paul Thompson to violate National Park Service Regulation 36 CFR §2.17(a)(3) by delivering a person or object to the surface of Lake Powell in the Glen Canyon National Recreation Area, Utah side, by a parachute without a permit.

Paul Thompson had jumped from a cliff in the Glen Canyon National Recreation Area with a soft rectangular canopy device commonly called a parachute. Paul Thompson landed on the surface of Lake Powell. By National Park Service Regulation 36 CFR §7.70(a)(6) the National Park Service designated the entire surface of Lake Powell as an airstrip. It is uncontroverted that aircraft are permitted to land on the surface of Lake Powell without a permit.

Although the soft canopy device used by Paul Thompson, is commonly called a parachute, it has a rectangular shape and is designed like an airplane wing with

a curved upper surface, which causes air to flow faster over the top of the wing and provide lift. The wing-like canopy used by Thompson is maneuverable; can be controlled by toggles attached to the wing; can slalom around pylons; rise vertically; stay aloft for eleven hours; and fly horizontally through the air for a distance of 230 miles.

The United States magistrate judge, and the United States District Judge for the District of Utah, and the United States Court of Appeals for the Tenth Circuit, decided that a prior decision of the Court of Appeals for the Tenth Circuit in *United States v. William Oxx, et al.*, 127 F.3d 1277 (10th Cir. 1997), controlled their decision in this case. Petitioner, Dennis McGlynn, was not a party to those proceedings in *United States v. William Oxx* (ibid).

In *United States v. William Oxx*, et al., 980 F.Supp. 405, 407 (D. Utah 1997), the United States District Judge found that National Park Service Regulation 36 CFR §2.17(a)(1) and (a)(3) are ambiguous and do not clearly describe the proscribed conduct so that a person of ordinary intelligence can understand what conduct is prohibited. The United States Court of Appeals for the Tenth Circuit reversed the District Judge on different grounds.

REASONS FOR GRANTING THE WRIT

I.

Defendant, Dennis McGlynn, Was Deprived Of His Constitutional Right To Present A Defense To The Criminal Charge Against Him.

Petitioner, Dennis McGlynn, as Defendant (herein called Defendant) was charged and convicted by a misdemeanor Indictment with aiding and abetting Paul Thompson to violate National Park Service Regulation 36 CFR §2.17(a)(3) by delivering a person or object to the surface of Lake Powell in the Glen Canyon National Recreation Area, Utah side, by a parachute without a permit.

Paul Thompson had jumped with a device commonly called a parachute from a cliff in the Glen Canyon National Recreation Area. He landed on the surface of Lake Powell.

National Park Service Regulation §2.17(a) provides in part:

> "(a) The following are prohibited:
>
> . . .
>
> (3) delivering a person or object by parachute, helicopter, or other means of air delivery, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit. For the purposes of this paragraph, "delivery" means the act of conveying or releasing persons or property."

This case is one of several cases arising out of persons jumping from the cliffs in the Glen Canyon National

Recreation Area and landing on the surface of Lake Powell. All cases originated with different proceedings, and had different evidence. Dennis McGlynn raised the defense that the device used by Paul Thompson, though called a parachute, was in fact an aircraft and, therefore, Paul Thompson was permitted to land on the surface of Lake Powell without a permit. The McGlynn case had additional issues which were presented but not addressed by the Tenth Circuit. There was more evidence in this case than in any of the others. Defendant, Dennis McGlynn, was not a party to those proceedings, and is not bound by an erroneous judgment in any of those proceedings. *United States v. Bevel*, 558 F.Supp. 95 (N.D. Ga. 1983). Yet, at all levels, the United States Magistrate Judge, the United States District Judge for the District of Utah, Central Division, and the United States Court of Appeals for the Tenth Circuit found that the decision of the Circuit Court of Appeals in *United States v. William Oxx, et al.*, 127 F.3d 1277 (10th Cir. 1997), was res judicata, and failed to consider the issues presented by Defendant, Dennis McGlynn, in this case.

In a two page slip opinion, the United States Court of Appeals for the Tenth Circuit said in this case:

> "We find that the device used in this case is exactly the same device as used in *Oxx*. We, therefore, find no principled way to distinguish this case from prior controlling authority of this court. This appeal is controlled by *Oxx, supra*."

and denied a Petition for Rehearing En Banc while continuing to ignore the additional issues and evidence.

Defendant, Dennis McGlynn, respectfully submits that the United States Court of Appeals for the Tenth Circuit could have found a principled way to distinguish their prior decision in *Oxx* if they had only read the Record on Appeal in *United States v. William Oxx, et al.*, 127 F.3d 1277 (10th Cir. 1997).

Admittedly, the record indicates that the devices are the same, but the issues, evidence and burden of proof between *Oxx* and this case are different. *Oxx* originated in the United States District Court by a Motion to Dismiss filed by the Defendants in that case alleging ambiguity in National Park Service Regulation 36 CFR §2.17(a)(1) and (a)(3). The flight characteristics of the device used by the Defendants was not an issue; and Defendants presented only minimal evidence of the flight characteristics of the device commonly called a parachute used by the Defendants. In *Oxx*, the United States District Judge found National Park Service Regulation 36 CFR §2.17(a)(3) was ambiguous. *United States v. William Oxx, et al.*, 980 F.Supp. 405 (D. Utah, 1997), and said at page 407:

> "At the outset, the court begins an analysis by recognizing that due process requires a criminal statute to be stated in terms which are reasonably definite so that a person of ordinary intelligence will know what the law prohibits or commands.

And said at page 408:

> "By its plain language, Section 2.17(a)(3) seeks to prohibit "delivering or retrieving a person or object by parachute, helicopter, or other airborne means." The ordinary meaning of the term "deliver" is to "set free from restraint" or

> to "give transfer, yield possession or control." . . .
>
> Thus, under the common meaning of delivery, it is difficult to understand how a person BASE jumping can be said to be "delivering" himself."

And in discussing the phrase, "other means of air delivery" in National Park Service Regulation 36 CFR §2.17(a)(3), the United States District Judge said at page 408:

> "Thus, according to its plain meaning, the average person would understand subsection (3) to prohibit delivery of a person or object by parachute, helicopter, airplane or any other device capable of human flight.
>
> At the same time, however, subsection (1) of section 2.17(a) provides that operation or use of aircraft is permitted in specially designated areas without a permit. Lake Powell is one of those areas." . . .

The entire surface of Lake Powell is a designated landing area and no permit is required for aircraft to land on the surface of Lake Powell. Title 36 CFR §7.70(a)(6).

> "§7.70 Glen Canyon National Recreation Area.
>
> (a) designated airstrips
>
> . . .
>
> (c) the entire surface of Lake Powell subject to the restrictions contained in §2.17 of this chapter."

The trial judge in *Oxx* went on to say,

> "As expressed above, the plain reading of the regulation appears to both at once permit delivery by airborne means and prohibit delivery by airborne means. The regulation, in this context, is sufficiently fraught with "ambiguity" that one would find it difficult to understand what is allowed and what is prohibited. . . .
>
> Accordingly, because the Court finds that the regulation as applied to the conduct of the defendants is ambiguous, the Information is hereby dismissed."

It is obvious from the decision of the United States District Judge in *Oxx* (980 F.Supp. 405) that the issue in that case presented on appeal to the United States Court of Appeals for the Tenth Circuit was the ambiguity in National Park Service Regulation 36 CFR §2.17(a)(1) and (a)(3) and not the flight characteristics of the device used by Paul Thompson.

Nevertheless, in *Oxx* (ibid. 127 F.3d 1277), the United States Court of Appeals for the Tenth Circuit misapprehended the ambiguity in National Park Service Regulation 36 CFR §2.17(a)(3) and CFR §7.70(a)(6) but instead concentrated on the parachute nomenclature of the device used by the Defendants and said at page 1279:

> "We turn first to the primary issue on appeal, are Defendants' BASE jumping parachutes included within the meaning of "parachute" in §2.17(a)(3)? Federal regulations define a parachute as 'a device used or intended to be used to retard the fall of a body or object through the air' 14 CFR §1.1 (1997)." . . .

> "Delivering is not defined in the regulations, but we believe it is apparent that moving oneself from one area to another, as Defendants did, constitutes delivery."

And concluded on page 1280:

> "A parachute by any other name is still a parachute, and delivering a person by parachute is prohibited."

Admittedly, the device used by Paul Thompson, is commonly called a parachute, but the device does more than

> "retard the fall of a body or object through the air,"

as a parachute is defined in 14 CFR §1.1. This definition of the word "parachute" in National Park Service Regulations 14 CFR §1.1 includes in 36 CFR §2.17(a)(3) only those parachutes which "retard the fall of a body or object through the air" and does not include the device used by Paul Thompson, which can fly through the air like an aircraft. All "aircraft" retard the fall of a body or object through the air. Otherwise, human flight through the air would be impossible.

Since the issue in the United States District Court in *Oxx* was the patent ambiguity in National Park Service Regulation 36 CFR §2.17(a)(1) and (a)(3), only minimal evidence of the flight characteristics of the device used by Paul Thompson, was presented to the District Court and included in the Record on Appeal to the United States Court of Appeals for the Tenth Circuit in *Oxx* (ibid.).

In this case, however, Defendant, Dennis McGlynn, presented patents showing the device used by Paul Thompson has a rectangular shape and is designed like

an airplane wing with a curved top surface which causes air to flow faster over the top surface to provide lift; and describing the operation and flight characteristics of the device used by Paul Thompson. Defendant also presented video tapes showing the device is maneuverable; can be used to slalom through gates; and presented evidence that the device can rise vertically, fly horizontally through the air a distance of 230 miles, and stay aloft for eleven hours. Most of this evidence was not in the Record on Appeal before the United States Court of Appeals for the Tenth Circuit when *United States v. William Oxx, et al.*,127 F.3d 1277 (10th Cir. 1997), was decided by that court. Since *Oxx* was decided on the facts before the court in that case, similar nomenclatures, i.e. parachutes, should not make *Oxx* res judicata on Defendant, Dennis McGlynn's defense in this case; and Defendant's defense discussed supra concerning the invalidity of and ambiguity in National Park Service Regulations 36 CFR §2.17(a)(1) and (a)(3) should be considered without reference to the prior decision of the United States Court of Appeals for the Tenth Circuit in *United States v. William Oxx*, et al., 127 F.3d 1277 (10th Cir. 1997).

II.

Because The Entire Surface Of Lake Powell Has Been Designated As A Landing Area, FAA Regulations Pre-Empt The Park Services' Authority To Regulate Aeronautical Activities On The Surface of Lake Powell. This Is An Issue Not Raised Or In Any Way Addressed In The Oxx Case, But Raised, Briefed And Argued At All Levels Of The McGlynn Case But Ignored By The Tenth Circuit

By Section 1 of Title 16 of the United States Code (16 U.S.C. §1), Congress created the National Park Service to establish National Parks and to promote and regulate the use of federal areas known as National Parks.

By Section 106 of Title 49 of the United States Code (49 U.S.C. §106), Congress created the Federal Aviation Administration within the Department of Transportation; and by the Federal Aviation Act (49 U.S.C. §40103), Congress authorized the Federal Aviation Administration to regulate and control all aeronautical activity within the navigable air space of the United States. *City of Burbank v. Lockhead Air Terminal, Inc.*, 411 U.S. 624, 634, 93 S.Ct. 1854, 1860, 36 L.Ed.2d 547 (1973).

By Section 7(a) of Title 16 of the United States Code (16 U.S.C. §7), Congress authorized the National Park Service to establish, maintain, and operate airports in or in close proximity to National Parks, but expressly provided:

> " . . . that the operation and maintenance of such airports shall be in accordance with the standards, rules or regulations of the Federal Aviation Administration."

Thus, Congress clearly intended for the Federal Aviation Administration to regulate aeronautical activity in National Parks.

By National Park Service Regulation 36 C.F.R. §2.17(e), the National Park Service expressly provides that:

> "(e) the operation of aircraft shall be in accordance with regulations of the Federal Aviation Administration."

So, by National Park Service Regulations 36 CFR §2.17(e), the National Park Service itself recognizes that the Federal Aviation Administration has preemptive and exclusive authority to regulate aeronautical activity in National Parks.

By National Park Service Regulation 36 C.F.R. §7.70(a)(6), the National Park Service designates the entire surface of Lake Powell in the Glen Canyon National Recreation Area as an airstrip, subject to the restrictions in Section 2.17 of this chapter.

An airstrip is a cleared area where aircraft can take off and land.

Admittedly, the National Park Service had jurisdiction over Lake Powell in the Glen Canyon National Recreation Area as a lake; and before designating the entire surface of Lake Powell as an airstrip, the National Park Service could regulate use of the lake and prohibit aircraft from landing or taking off from the surface of the lake. But when the National Park Service designated the entire surface of Lake Powell as an airstrip, the status of Lake Powell changed from a lake in a National Park to

part of the navigable air space system of the United States for the taking off and landing of aircraft; and jurisdiction to regulate aeronautical activity on the surface of Lake Powell was transferred to and preempted by the Federal Aviation Administration as intended by Congress. *City of Burbank v. Lockhead Air Terminal, Inc.*, 411 U.S. 624, 625, 629, 93 S.Ct. 1854, 1856, 36 L.Ed.2d 547 (1973).

Paragraph 4-8(a)(1) and 4-8(b) of Federal Aviation Administration Airport Compliance Code 5190.6A (10/2/89), expresses the policy of the Federal Aviation Administration that parachute jumping is an aeronautical activity controlled by the Federal Aviation Administration which must be permitted at all publicly financed airports. Case law also considers parachute jumping as an aeronautical activity, subject to control of the Federal Aviation Administration. *Edison v. The Reliable Life Insurance Companies*, 664 F.2d 1130, 1132 (9th Cir. 1981). *Louisiana Regional Airport v. Aero Resources*, 962 F.Supp. 866, 867 (N.D. La. 1997). *Skydiving Center v. St. Mary's County Airport Commissioner*, 823 F.Supp. 1273, 1283 (D. Md. 1993). *Wilson v. Insurance Company of North America*, 453 F.Supp. 732 (N.D. Cal. 1978).

Since Congress granted the Federal Aviation Administration exclusive authority to regulate aeronautical activity in National Parks, the National Park Service has no authority to enforce Regulation 36 CFR §2.17(a)(3); as it relates to Lake Powell and Defendant, Dennis McGlynn, cannot be found guilty of violating the regulation in an area where the regulation is unenforceable. The Park Service recognized the FAA authority when it

adopted Sub-Paragraph (e) of Section 2.17. "(e) the operation of aircraft shall be in accordance with regulations of the Federal Aviation Administration."

III.

National Park Service Regulation 36 CFR §2.17(a)(1) And (a)(3) Are Ambiguous Particularly, When Taken In Conjunction With 36 CFR §7.70(a)(6), Do Not Clearly Describe What Conduct Is Prohibited.

National Park Service Regulation 36 CFR §2.17(a) provides in part:

> "(a) the following are prohibited:
>
> (1) operating or using aircraft on lands or waters other than at designated take off or landing areas, except pursuant to the terms and conditions of a permit.
>
> . . .
>
> (3) delivering a person or object by parachute, helicopter, or other means of air delivery, except in emergencies involving public safety or serious property loss, or pursuant to the terms and conditions of a permit. For the purposes of this subparagraph, "delivery" means the act of conveying or releasing persons or property."

CFR §7.70(a)(6) provides, in part,

> §7.70 Glen Canyon National Recreation Area.
>
> (a) designated airstrips
>
> . . .
>
> (c) the entire surface of Lake Powell subject to the restrictions contained in §2.17 of this chapter."

Criminal statutes should clearly describe the proscribed conduct, so that a person of ordinary intelligence can understand what conduct is prohibited. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). National Park Service Regulation 36 CFR §2.17(a)(1) and (a)(3) are ambiguous and do not clearly describe what conduct is prohibited.

36 CFR §2.17(a)(1) permits aircraft to land at designated take off or landing areas without a permit.

36 CFR §2.17(a)(3) prohibits parachutes, helicopters, or other means or air delivery, which includes all aircraft, from landing anywhere without a permit.

This ambiguity is illustrated by the conflicting opinions of the United States District Court, District of Utah (980 F.Supp. 405) and of the United States Court of Appeals for the Tenth Circuit (127 F.3d 1277) in *United States v. William Oxx, et al.*

In *United States v. William Oxx, et al.*, 980 F.Supp. 405 (D.C. Utah 1997), the District Judge decided National Park Service Regulation 36 CFR §2.17(a)(1) and (a)(3) were ambiguous and said at page 408:

> "Thus, what the regulations seem to give with one hand, i.e. the right to land an aircraft without a permit, they appear to take away with the other, i.e. no delivery or retrieval of persons by 'airborne means.' "

On the other hand, the United States Court of Appeals for the Tenth Circuit, in *United States v. William Oxx, et al.*, 127 F.3d 1277 (10th Cir. 1997), in reversing the District Judge, said at page 1279:

> "Nevertheless, to answer the contention that what is forbidden in §2.17(a)(3) is simultaneously allowed elsewhere, we note that §2.17(a)(3) only prohibits airborne delivery without a permit. When read together, so that each provision has meaning, there is no more conflict between the regulations than there is between one rule that allows a person to drive a car on the roads, and another that requires a permit to do so."

In other words, the United States Court of Appeals for the Tenth Circuit construed 36 CFR §2.17(a)(3) as requiring a permit before any aircraft could land anywhere on National Park Service property. This interpretation of 36 CFR §2.17(a)(3) by the United States Court of Appeals for the Tenth Circuit is contrary to and overlooks the language in 36 CFR §2.17(a)(1) and the language of CFR §7.70(a)(6) which expressly permit all aircraft to land at designated take off or landing areas without a permit. This interpretation of 36 CFR §2.17(a)(1) and (a)(3) by the Court of Appeals is also contrary to the interpretation of Regulation 36 CFR §2.17(a)(1) and (a)(3) by the National Park Service which concedes that aircraft can land at designated landing areas in National Parks without a permit including the entire surface of Lake Powell.

The words "delivering a person or object by parachute, helicopter or other airborne means" contributes to the ambiguity in 36 CFR §2.17(a)(3). The word "delivery" in common usage connotes handing over of some res from one person to another. Most individuals would not consider jumping from a cliff with a parachute and landing on the surface of Lake Powell as delivering one's self to the surface of Lake Powell, as construed by the Court

of Appeals in *Oxx* (ibid.), anymore than they would consider walking from one room to another room in a house as delivering one's self to the second room in the house. As two witnesses (who testified in this case) inquired, how could they deliver themselves since they were already there?

If learned Justices of the United States courts disagree as to what conduct is permitted and prohibited by National Park Service Regulation 36 CFR §2.17(a)(1) and (a)(3), an ordinary intelligent person cannot understand what conduct is prohibited, and National Park Service Regulation 36 CFR §2.17(a)(3) cannot be enforced. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 963 (1983). *Kmart Corp. v. Carter, Inc.*, 486 U.S. 281, 294, 108 S.Ct. 1811, 1819, 100 L.Ed.2d 313 (1988).

It was entirely reasonable, given the flight characteristics of Paul Thompson's device, for Dennis McGlynn to conclude that his "parachute" was, in reality, an aircraft and, thus, permitted to land on the surface of Lake Powell without a permit, particularly, in the light of two appellate court opinions in effect at the time. The Utah Supreme Court, in the context of a life insurance exclusion, recognized and ruled that a "parachute" was an aircraft. *Deschler v. Fireman's Fund American Life Insurance Company*, 663 P.2d 97, 39 ALR 4th 209 (Supreme Court of Utah (1983)). Likewise, in 1983, the Ninth Circuit Court of Appeals in a similar case, also ruled that a "parachute" was an aircraft. *Edison v. The Reliable Life Insurance Company*, 664 F.2d 1130, 1132 (9th Cir. 1981).

The trial judge in the Will Oxx case felt the Statute was ambiguous; both the Ninth Circuit Court of Appeals

and the Utah Supreme Court ruled that the devices in question were "aircraft". In the McGlynn trial, Ranger Sumner testified for the Government and on cross-examination was shown a video of various powered aircraft whose lifting surface or wing was a soft canopy identical to the "parachute" used by Paul Thompson. When asked if he would make an arrest if that device landed on the surface of Lake Powell he said he would "have to further investigate." The Government also conceded that if a person were to "parachute" from a conventional aircraft onto the surface of Lake Powell, FAA regulations would control.

Also in the Dennis McGlynn trial, the Paul Thompson "parachute" was conclusively shown to be an "aircraft". That leaves only the Tenth Circuit opinion that a "parachute is a parachute" and that opinion was based on an erroneous premise. Three out of four, Dennis McGlynn should win.

CONCLUSION

This case may not involve great public interests, but it does involve grave Constitutional issues, i.e., the right of individuals to present a defense to criminal charges against them and to have their defense considered by the court uncontrolled by prior decisions on different facts in other cases to which they were not a party.

Wherefore, Petitioner, Dennis McGlynn, requests that this Supreme Court of the United States grant this petition and issue a Writ of Certiorari to the United States

Court of Appeals for the Tenth Circuit to review a judgment of that court convicting Defendant, Dennis McGlynn, of aiding and abetting Paul Thompson to violate National Park Service Regulation 36 CFR §2.17(a)(3) by delivering a person or object to the surface of Lake Powell in the Glen Canyon National Recreation Area by a parachute without a permit; and

Upon review, Petitioner requests that this Supreme Court of the United States reverse the judgment of the United States Court of Appeals for the Tenth Circuit and acquit Petitioner of the charges against him.

Respectfully submitted,

FRED M. MORELLI, JR.
Attorney for Petitioner,
DENNIS MCGLYNN
403 W. Galena Blvd.
Aurora, IL 60507-1416
(630) 892-6665

APPENDIX

APPENDIX

TABLE OF CONTENTS

Pages

Unpublished Opinion:

United States vs. Gravity Sports Ltd., and Dennis McGlynn, 10th Circuit 00-4098, 12/15/00 ..... App. 1

Unpublished Opinion:

United States vs. Gravity Sports, Ltd., and Dennis McGlynn, Utah 2-96-CR-0052 B 5/26/00 ..... App. 3

Unpublished Opinion:

Order, Tenth Circuit, 1/15/01 ..... App. 14

Federal Aviation Administration Compliance Code 5190.6A, 10/2/89 Paragraph 4-8(a)(1) and 4-8(b) ..... App. 15

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 00-4098
v.	)	(D. Ct. No. 96-CR-0052B)
GRAVITY SPORTS, LTD., DENNIS McGLYNN	)	(D. Utah)
Defendant-Appellant.	)	

ORDER AND JUDGMENT

(Filed Dec. 15, 2000)

Before **TACHA, McKAY,** and **HENRY,** Circuit Judges.

This appeal is from an order of the district court affirming the conviction and sentences of defendants Dennis McGlynn and Gravity Sports, Ltd., who were charged with aiding and abetting Paul Thompson in violating National Park Service Regulation 36 C.F.R. § 2.17(a)(3), a class B misdemeanor, by delivering a person or object to the surface of Lake Powell in the Glen Canyon National Recreation Area on the Utah side, by a parachute without a permit. The defendants were found guilty of these offenses and the sentences were imposed by the magistrate judge and affirmed by the district court.

The defendants' appeal urges us to interpret § 2.17(a)(3) in a way that distinguishes this case from *United States v. Oxx*, 127 F.3d 1277 (10th Cir. 1997). The district court in this case clearly stated

> [b]oth sides acknowledge that the parachutes used by the defendants are the same as those at issue in *Oxx*. As stated in *Oxx*, "the term 'parachute' in § 2.17(a)(3) unambiguously applies to the parachutes used by defendants in BASE jumping." *See Oxx*, 127 F.3d at 1279. The Tenth Circuit further stated, "[a] parachute by any other name is still a parachute, and delivering a person by parachute is prohibited" and "[t]echnological improvement in the shape, maneuverability, and control of modern parachutes, including those used here, do not make them cease to be parachutes." *Id.* at 1279-80.

United States v. Gravity Sports, Ltd., No. 2:96-CR-0052 B, slip op. at 5 (D. Utah May 30, 2000).

We find that the device used in this case is exactly the same device as that used in *Oxx*. We therefore find no principled way to distinguish this case from prior controlling authority of this court. This appeal is controlled by *Oxx, supra*. The order of the district court is affirmed.

ENTERED FOR THE COURT,

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff/Appellee, vs. GRAVITY SPORTS, LTD., DENNIS McGLYNN, Defendants/Appellants.	**MEMORANDUM OPINION & ORDER** Case No. 2:96-CR-0052B

INTRODUCTION

(Filed May 30, 2000)

On September 15, 1994, Paul Thompson pursued an activity known as BASE[1] jumping at Lake Powell in Southeastern Utah. He jumped from a cliff into the water below. On the descent, he struck a cliff and was killed. Defendants, Dennis McGlynn and Gravity Sports, Ltd., were charged with aiding and abetting Paul Thompson to violate National Park Service Regulation 36 C.F.R. § 2.17(a)(3), a class B misdemeanor, by delivering a person or object to the surface of Lake Powell in the Glen Canyon National Recreation Area, Utah side, by a parachute without a permit. Following a bench trial to Magistrate Judge Samuel Alba, both defendants were found guilty of the offense and now appeal their conviction to

[1] BASE is an acronym for buildings, antenae, spans and earth forms.

this court pursuant to Federal Rule of Criminal Procedure 58(g)(2)(B). This court has original jurisdiction under 18 U.S.C. § 3231. Having reviewed the memoranda submitted by the parties, the court issues this Memorandum Opinion and Order.

Entered on docket

5/3/00 **by:**

[ILLEGIBLE]
Deputy Clerk

BACKGROUND

In the spring of 1994, Gravity Sports circulated a flyer advertising "Cliff Camp 94." For a fee of $1,000, Gravity Sports offered prospective attendees of Cliff Camp 94 "the chance to learn, while you experience first hand, every aspect of slider-down 'cliffin.' " Cliff Camp 94 was touted in the advertisement as "an accelerated course in fixed object jumping, allowing you to do and learn in one week what might take years by traditional methods." Participants were told that they would make ten to fifteen jumps at up to seven different sites.

During September, 1994, a group of approximately ten to twelve persons, including McGlynn and Thompson, traveled from California to Lake Powell to participate in Cliff Camp 94. The group traveled to approximately seven different cliff sites. On September 15, 1994, Thompson jumped from a cliff located on the Utah side of Lake Powell in the Glen Canyon National Recreation Area. Upon jumping from the cliff, Thompson deployed a rectangular shaped parachute, or as the

defendant asserts, "a rectangular 'RAM-air' aeroelastic wing inflatable canopy" (RAM canopy), which appeared to malfunction and throw him into the side of the cliff wall. Thompson sustained injuries causing his death.

Following their trial and conviction, the defendants were sentenced by the Magistrate Judge on August 27, 1999. Defendant McGlynn was sentenced to three months incarceration, sixty months probation, and required to pay $2,225 in restitution. Defendant Gravity Sports, Ltd. as ordered to pay a $5,000 fine.

Defendants now appeal the Magistrate Judge's ruling, arguing that their convictions should be reversed. As stated by the defendants, they advance the following arguments: (1) the defendants are not bound by the United States Court of Appeals for the Tenth Circuit's decision in *United States v. Oxx*, 127 F.3d 1277 (10th Cir. 1997); (2) the government failed to meet its burden of proving beyond a reasonable doubt that a person of ordinary intelligence will understand what conduct is prohibited, and the defendants could reasonably have believed that the RAM canopy qualified as an aircraft capable of powerless flight; (3) the Federal Aviation Administration has exclusive jurisdiction of aeronautical activity on Lake Powell rather than the National Park Service; and (4) defendant Gravity Sports was a dissolved partnership not capable of committing a crime as a separate entity.[2]

---

[2] On November 12, 1999, after the appeal was fully briefed, defendants filed a motion to add additional argument, contending that the fine imposed on defendant Gravity Sports is an additional punishment on McGlynn as the remaining proprietor of Gravity Sports, which constitutes double

DISCUSSION

All issues presented in this appeal are issues of law, and the Court accordingly reviews them *de novo*. *See United States v. Wood*, 6 F.3d 692, 694 (10th Cir. 1993).

United States v. Oxx

Count II of the indictment charges the defendants with aiding and abetting delivery of Paul Thompson by parachute to the surface of Lake Powell without a permit in violation of National Park Service Regulation 36 C.F.R. § 2.17(a)(3). The instant appeal hinges on the interpretation of section 2.17(a)(3) and in that regard whether the Tenth Circuit Court of Appeal's opinion in *United States v. Oxx*, 127 F.3d 1277 (10th Cir. 1997) is controlling here.

Defendants contend that the Magistrate Judge erroneously followed *Oxx* as controlling precedent, arguing that the only issue before the Tenth Circuit in *Oxx* was whether a RAM canopy was more than a parachute for purposes of a motion to dismiss. Defendants argue that in the instant case the government must have proved beyond a reasonable doubt that a RAM canopy was not an aircraft. Regardless whether the Court is reviewing a motion to dismiss or, as in the case at bar, a conviction from a bench trial, the Court must interpret section 2.17,

---

punishment in violation of the Fifth Amendment. The government opposes the motion as untimely. The Court agrees. Furthermore, there is also no evidence that this argument was raised below to the Magistrate Judge. Moreover, even if the Court were to consider defendants' argument, defendants have provided virtually no legal support for their proposition. The motion to add this additional argument is denied.

and the Tenth Circuit's decision in *Oxx* provides clear guidance as to the proper interpretation.

Section 2.17(a)(1) states:

> § 2.17 aircraft and air delivery,
>
> (a) The following are prohibited:
>
> (1) operating or using aircraft on lands or waters other than at locations designated pursuant to special regulations.
>
> . . .
>
> (3) delivering or retrieving a person or object by parachute, helicopter, or other airborne means, except in emergencies involving public safety or serious property loss or pursuant to the terms and conditions of a permit.

36 C.F.R. § 2.17(a)(1) and (a)(3).

Defendants assert that section 2.17 is ambiguous when considering the definitions contained in other National Park Service Regulations, specifically 36 C.F.R. §§ 7.70(a)(6) and 1.4(a), as well as 40 Fed. Reg. 36,378 (1975). Section 770 provides:

> § 770 Glen Canyon National Recreation Area.
>
> (a) designated airstrips
>
> . . .
>
> (6) the entire surface of Lake Powell subject to the restrictions contained in § 2.17 of this chapter.

36 C.F.R. § 7.70(a)(6). Section 1.4 defines aircraft as including powerless flight. *See* 36 C.F.R. § 1.4(a). According to a statement by the director of the National Park

Service, powerless flight includes parachutes. *See* 40 Fed. Reg. 36,378 (1975) (stating under the heading of "Powerless Flight," that "launching or landing of recreational gliders, sailplanes, parachutes, body kites, hang gliders, and other devices designed to carry persons or objects through the air in powerless flight is prohibited").

Based on the above definitions, defendants argue that the regulations provide for the use of aircraft in designated areas (section 2.17(a)(1)), that Lake Powell is a designated airstrip (section 7.70(a)(6)), that aircraft includes powerless flight (section 1.4(a)), and that according to a statement by the director of the National Park Service in the Federal Register parachutes are within the definition of powerless flight (40 Fed. Reg. 36,378). In contrast to defendants' argument, section 2.17(a)(3) plainly prohibits delivering a person by parachute.

Defendants attempt to overcome section 2.17(a)(3) by arguing that Thompson's RAM canopy was more like a powerless aircraft than a parachute.[3] If *Oxx* is controlling

---

[3] Defendants filed a motion to cite additional authority on February 8, 2000. The Court grants that motion and have considered the authority presented therein, which include a number of insurance cases that stand for the proposition that rectangular-shaped parachutes, hang kites, and water ski kites may be considered aircraft for insurance purposes due to the operator's control of the devices. *See Deschler v. Fireman's Fund Life Insurance Co.*, 663 P.2d 97 (Utah 1983); *Clark v. Lonestar Life Insurance Co.*, 347 S.W.2d 290 (Tex. App. 1961); *Wilson v. Insurance Co. of N. Am.*, 453 F.Supp. 732 (N.D. Cal. 1978). While these cases may be interesting, they are not on point and fail to address the regulation here in issue and the clear interpretation thereof in *Oxx*.

precedent, this argument must fail. Both sides acknowledge that the parachutes used by the defendants are the same as those at issue in *Oxx*. As stated in *Oxx*, "the term 'parachute' in § 2.17(a)(3) unambiguously applies to the parachutes used by defendants in BASE jumping." *See Oxx*, 127 F.3d at 1279. The Tenth Circuit further stated, "[a] parachute by any other name is still a parachute, and delivering a person by parachute is prohibited" and "[t]echnological improvement in the shape, maneuverability, and control of modern parachutes, including those used here, do not make them cease to be parachutes." *Id.* at 1279-80. Even Thompson's own device was labeled "Quark 7 cell RAM air parachute. . . . Caution: high performance parachute."

Defendants went to extensive efforts at trial, through the use of expert testimony and other exhibits, to demonstrate that the RAM canopy in question was capable of traveling significant horizontal distances, making it a powerless flight vehicle. However, there is no question the indicted conduct consisted of jumping off a cliff and attempting to land in the water below. Thompson was clearly using what the regulations define as a parachute: "a device used or intended to be used to retard the fall of a body or object through the air." 14 C.F.R. § 1.1.

The Magistrate Judge correctly followed *Oxx* as binding precedent. He based his verdicts of guilty on the facts presented at trial, from which it was reasonable to conclude that the device in question was a parachute.

Understanding of Prohibited Conduct

Defendants cite *Kolender v. Lawson*, 461 U.S. 352 (1983), for the proposition that criminal statutes are to be

strictly construed and must clearly define the proscribed conduct so that all persons of ordinary intelligence can understand what conduct is prohibited. *See id.* at 357. Defendants contend that the Magistrate Judge's ruling was based on an improper construction of the relevant statute, and that the proscribed conduct was not sufficiently clear.

Defendants argue that reasonable people could believe that section 2.17(a)(1) permits powerless flight to land on the surface of Lake Powell and that defendants' RAM canopy qualifies as powerless flight. However, a person of ordinary intelligence should understand that section 2.17(a)(3) plainly prohibits delivery of a person by parachute, and that the device at issue in this case was a parachute. Such clarity cannot be replaced by convoluting some other alternative to create ambiguity. *See Abernaz v. United States,* 450 U.S. 333, 342 (1981) ("Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent."). The Tenth Circuit has spoken: "As the intent of the regulation is abundantly clear, 'nothing is left to construction.' " *Id.* at 1230 (quoting *United States v. Fisher,* 6 U.S. (2 Cranch) 214, 230 (1805)). Here again, *Oxx* is controlling precedent. There, the Tenth circuit in addressing this same issue stated that "the regulation made it reasonably clear at the relevant time that the defendant's conduct was criminal.' " *Oxx,* 127 F.3d at 1279 (quoting *United States v. Lanier,* 520 U.S. 259 (1997)).

Federal Aviation Administration and National Park Service Jurisdiction

Defendants argue that the National Park Service is not authorized to regulate aeronautical activity and that the Federal Aviation Administration (FAA) has exclusive jurisdiction over aeronautical activity at Lake Powell. Thus, defendants contend that the Magistrate Judge convicted the defendants under an improper statute because the National Park Service is precluded from enforcing section 2.17(a)(3).

Defendants base their argument on the assertion that when the National Park Service designated the surface of Lake Powell as an airstrip pursuant to section 7.70 the National Park Service relinquished and transferred whatever control it had to the FAA. Defendants also assert that parachute jumping is an aeronautical activity under FAA Airport Compliance Order 5190.6A (1989). Defendants' argument is without merit. Lake Powell is not an FAA certified airport and its designation as an airstrip cannot be viewed as the same. The government, in its opposition to defendants' motion to dismiss, submitted position papers by both the National Park Service and the FAA, each supporting the government's position that the National Park Service has jurisdiction to regulate BASE jumping at Lake Powell, rather than the FAA.

Moreover, jumping off the cliffs at Lake Powell and landing in the water below – regardless of what vehicle slows the descent – falls within the National Park Service's jurisdiction. The National Park Service is charged with promoting and regulating the use of park lands so as "to conserve the scenery and the natural and historic

objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. The national parks fall under the jurisdiction and management of the National Park Service, and the Secretary of the United States Department of the Interior is charged with making and publishing "such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations" under the National Park Service's jurisdiction. 16 U.S.C. § 3. *See also Lesoeur v. United States,* 21 F.3d 965, 968 (9th Cir. 1994) (noting that "the Secretary has a great deal of discretion in promulgating and enforcing regulations for use of the national parks under 16 U.S.C. § 3"); *Wilkenson v. Department of Interior,* 634 F.Supp. 1265 (D. Colo. 1986) (noting that the congressional grant of authority to the Secretary to manage the national park system is "very broad").

The National Park Service's enforcement of section 2.17(a)(3) against BASE jumping at Lake Powell is not preempted or precluded by the FAA's assertion of jurisdiction over parachute and FAA-certified airport activities. The Magistrate Judge's rejection of defendants' argument, and his application of section 2.17(a)(3) to defendants' conduct was appropriate.

Dissolution of Gravity Sports, Ltd. and Its Liability

Defendants assert that defendant Gravity Sports cannot be convicted of a crime because it is a dissolved partnership. There is no evidence that this issue was raised below. This Court sits in review of the matters addressed by the Magistrate Judge in the trial and related

proceedings of the defendants' underlying class B misdemeanor convictions. *See Berna v. Chater*, 101 F.3d 631, 632 (10th Cir. 1996) (holding that appellate review "is limited to the issues . . . properly preserve[d] in the [trial] court and adequately present[ed] on appeal"); *Walker v. Mather*, 959 F.2d 894, 896 (10th Cir. 1992) (holding that as a "general rule . . . 'a federal appellate court does not consider an issue not passed upon below' " (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976))). Defendants waived this argument by not raising it below.

CONCLUSION

For the foregoing reasons, the convictions and sentences imposed by the Magistrate Judge are AFFIRMED.

DATED, this 26th day of May, 2000.

/s/ Dee Benson
Dee Benson
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 00-4098
v.	)	
GRAVITY SPORTS, LTD; DENNIS McGLYNN	)	
Defendants-Appellants,	)	

ORDER

Filed January 19, 2001

Before **TACHA**, Chief Judge, **McKAY**, and **HENRY**, Circuit Judges.

Appellant Dennis McGlynn's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Amy Frazier
Deputy Clerk

AIRPORT COMPLIANCE REQUIREMENTS

[LOGO]

OCTOBER 2, 1989

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

* * *

4-8. RESTRICTIONS ON AERONAUTICAL USE OF AIRPORT.

a. Safety and Efficiency.

(1) While the airport owner must allow its use by all types, kinds, and classes of aeronautical activity as well as by the general public (passengers, visitors, etc.), the obligation agreements do provide for exceptions as discussed in this paragraph. When complaints are filed with FAA regarding restrictions imposed by the airport owner in the interest of safety and/or efficiency, assistance of the appropriate local Flight Standards and Air Traffic representatives should be obtained in determining the reasonableness of the restrictions. It may be appropriate to initiate an FAA airspace study to determine the efficiency and utility of the airport when considering the proposed restriction. In all cases the FAA will make the final determination of the reasonableness of the airport owner's restrictions which denied or restricted use of the airport.

* * *

b. Parachute Jumping. Parachute jumping is an aeronautical use and requests to airport owners from parachute jumping clubs, organizations, or individuals to

establish a drop zone within the boundaries of an airport should be evaluated on the same basis as other aeronautical uses of the airport. Any restriction, limitation, or ban against parachute jumping on the airport must be based on the grant assurance which provides that the sponsor may prohibit or limit an aeronautical use "for the safe operation of the airport or when necessary to serve the civil aviation needs of the public" (see paragraph 4-8a). Among the reasonable limitations on parachute jumping that an airport owner might require are:

(1) The airport owner designate reasonable time periods for jumping and specific areas for drop zones.

(2) Jumpers (or requesting organization) agree to pay a reasonable fee that is not unjustly discriminatory.

(3) Jumpers hold a general liability insurance policy that names the airport owner as an additional ensured party, with the amount of insurance to be reasonable and not unjustly discriminatory. The airport owner is not required to permit this activity if, in his judgment, it creates a safety hazard to the normal operations of aircraft arriving or departing from the airport, nor is the airport owner required to close the airport to provide a safe environment for the parachute jumpers. In cases where complaints are filed with FAA, Flight Standards and Air Traffic should be consulted to help determine the reasonableness of the airport owner's restrictions. It may be appropriate to initiate an FAA airspace study to determine the efficiency and utility of the airport when considering the proposed restriction. In all cases the FAA will make the final determination of the reasonableness of the

airport owner's restrictions which denied or restricted use of the airport.

* * *